JAMES KENNETH ENG SIEW GOH A

v.

LEE KING ONG

COURT OF APPEAL, PUTRAJAYA B
ZAINUN ALI JCA
RAMLY ALI JCA
ZAHARAH IBRAHIM JCA
[CIVIL APPEAL NO: W-02-351-2009]
24 DECEMBER 2013 C

TORT: *Negligence - Medical negligence - Prescription of beta blocker drug blocadren - Whether caused deceased's death - Whether blocadren caused resultant damage to deceased - Whether deceased would not have experienced severe restriction resulting in closing up of bronchioles 'but for' effects of blocadren - Whether respondent aware blocadren ought not to have been prescribed to asthma patient - Whether there was duty of care on doctor's part - Whether breached - Chain of causation - Whether established* D

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The appellant was the administrator of the estate of his deceased daughter ('the deceased'). The respondent was at all material times a doctor in private general practice. On 28 July 1999, the deceased had complained of rapid heartbeat and hand tremors and was seen by the respondent at his clinic, accompanied by her mother ('PW1'). The respondent prescribed a drug "blocadren" in tablet form to help slow down the deceased's pulse rate. It was the appellant's case that upon arriving home that same evening, the deceased had swallowed the recommended dosage of a quarter of the said drug but almost immediately thereafter suffered breathing difficulties. In the car, on the way to Pantai Medical Centre, the deceased had collapsed. Upon arrival at Pantai Medical Centre, one Dr Damodaran ('PW5') a consultant anaesthetist, had resuscitated the deceased. Unfortunately, she G H I

A suffered severe brain damage and remained in a coma from which she did not recover until her death on 15 March 2000. The appellant sued the respondent for negligence and damages pursuant thereto, in prescribing blocadren, a non-selective beta blocker to the deceased who was asthmatic, when this drug was
B contraindicated to her condition. The respondent disputed that blocadren had caused the violent reaction suffered by the deceased and that this event was not foreseeable. The High Court Judge held that the issue of causation had not been established and had dismissed the appellant's claim. The issue that arose herein was
C whether there was a failure by the appellant to establish causation. The appellant submitted that causation had indeed been proven but the trial judge had not had the benefit of referring to certain excerpts of the evidence adduced, since these particular excerpts were inadvertently omitted from the body of evidence before the
D court. The 'missing evidence' was that of PW1, which was crucial since the issue at hand was whether upon consumption of the blocadren prescribed to the deceased by the respondent, the deceased had tried to use the ventolin inhaler after she experienced breathing difficulties. The trial judge had implied that
E should this be in evidence (that if the deceased had used her ventolin inhaler and if it had been proven to be ineffective, chances are that her receptor sites had been blocked by the effects of blocadren) it would have led him to conclude that the blocadren was the cause of the resultant 'damage' suffered by the
F deceased. The burden rested on the appellant to prove causal connection on a balance of probabilities between the deceased's injury and the respondent's alleged negligence, thus the question that arose was whether the chain of causation had been established to the required degree of proof.

G

Held (allowing appeal with costs)
Per Zainun Ali JCA delivering the judgment of the court:

(1) On the strength of the evidence adduced by PW1, the
H deceased had in fact attempted to mitigate the sudden onset of what she believed to be an asthma attack, by using her ventolin inhaler, which in this case failed to ease her distress. A reference could have been drawn that her receptor sites had been blocked by the effects of blocadren, since the 'rescue
I medication' was ineffectual. There was no evidence that the dosage of ativan, a muscle relaxant which was prescribed by PW3 the day before the said incident was high enough to

reduce respiration to such an extent that the deceased's heart had actually stopped and her brain deprived of oxygen. The evidence given by PW1 was unchallenged. Thus, on a balance of probabilities, it would have been the blocadren which caused the deceased her resultant damage, in which case causation would have been proven. (paras 30, 78, 80, 91 & 92)

(2) Overwhelming evidence showed that both ativan and ventolin were not the precursors to the violent reaction experienced by the deceased. It was clear on a preponderance of probabilities that it was the blocadren tablet which brought on the severe reaction experienced by the deceased. The deceased had died from acute respiratory depression, hypoxic brain injury and respiratory arrest following a bronchial asthmatic attack. Even if it was argued that the deceased had ingested two ativan tablets the day before, they had no effect on her breathing and so could not be attributed to her injury thereafter. But her reaction to the blocadren was immediate and severe. The deceased would not have experienced a severe restriction resulting in the closing up of her bronchioles 'but for' the effects of the blocadren. (paras 111, 112, 118, 119 & 120)

(3) The medical journals referred to by counsel supported the view that a non-specific beta blocker should never be given to an asthmatic, unless it was cardio-selective and that the asthma was well-controlled and monitored and/or where the benefits outweigh the risks. In addition, the comment made by the trial judge that 'if there had been evidence that the deceased had tried to use ventolin after taking the blocadren tablet and that it had not worked, then perhaps one could safely say it was the blocadren that blocked the deceased's medication for asthma' becomes extremely significant in the light of the fact that the trial judge had been deprived of considering this very evidence in the missing notes of PW1's evidence. If the trial judge had been appraised of this evidence, he would have found differently on the issue of causation. (paras 121, 122 & 123)

(4) Every possible link in the chain of causation had been established to the degree of proof which was much higher than the requisite level. There were more than sufficient grounds for the trial judge on a balance of probabilities to have found that the beta-blocker blocadren was the direct cause of

A the status asthmatics in which the deceased found herself immediately after ingesting the same for the following reasons (i) no drug taken by the deceased would have elicited the violent response she experienced as the beta blocker she ingested and which was prescribed by the respondent;
B (ii) there were sufficient material and expert evidence adduced to confirm that a non-specific beta blocker was dangerous in asthmatics; and (iii) the respondent's own evidence suggested that he was aware that a beta blocker (blocadren) ought not have been prescribed in the circumstances. Hence, there was
C a duty of care on the respondent's part, that duty was breached and that the resultant damage was foreseeable. Causation was thus proved by the appellant. (paras 125, 126, 127 & 128)

D ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu adalah pentadbir harta pusaka si mati anak perempuannya ('si mati'). Responden pada setiap masa adalah seorang doktor amalan umum swasta. Pada 28 Julai 1999, si mati telah mengadu
E mengalami denyutan jantung yang cepat dan getaran tangan dan, ditemani oleh ibunya ('PW1'), telah diperiksa oleh responden di kliniknya. Responden telah memberikan preskripsi ubat 'blocadren' dalam bentuk tablet untuk membantu memperlahankan kadar nadi si mati. Adalah kes perayu bahawa apabila tiba di rumah pada
F waktu petang pada hari yang sama, si mati telah menelan dos yang disyorkan iaitu satu perempat daripada ubat tersebut tetapi dengan serta-merta selepas itu telah mengalami kesukaran pernafasan. Dalam perjalanan ke Pantai Medical Centre, si mati telah rebah. Apabila tiba di Pantai Medical Centre, Dr Damodaran ('PW5'),
G seorang pakar bius telah menyedarkan semula si mati. Malangnya, si mati telah mengalami kerosakan otak yang teruk dan kekal dalam koma dari mana dia tidak pulih sehingga kematiannya pada 15 Mac 2000. Perayu telah menyaman responden atas kecuaian dan kerugian dalam memberi preskripsi blocadren, satu penghalang
H beta tak spesifik kepada si mati yang mempunyai penyakit asma, apabila ubat ini tidak digalakkan dalam keadaannya. Responden mempertikaikan bahawa blocadren mengakibatkan tindak balas kuat yang dialami oleh si mati dan bahawa perkara ini tidak boleh dijangkakan. Hakim Mahkamah Tinggi memutuskan bahawa isu
I penyebaban gagal dibuktikan dan telah menolak tuntutan perayu. Isu yang timbul adalah sama ada terdapat kegagalan oleh perayu untuk membuktikan penyebaban. Perayu menghujahkan bahawa

penyebaban telah dibuktikan tetapi hakim bicara tidak mempunyai manfaat untuk merujuk kepada petikan tertentu daripada keterangan yang telah dikemukakan, kerana petikan tersebut secara tidak sengaja diketepikan daripada keterangan di hadapan mahkamah. 'Keterangan yang hilang' adalah dari PW1, dan adalah penting kerana isu yang timbul adalah sama ada apabila mengambil blocadren seperti yang telah dipreskripsi oleh responden kepada si mati, si mati telah cuba menggunakan alat sedut ventolin selepas mengalami kesukaran pernafasan. Hakim bicara dengan tersirat telah menyatakan bahawa jika ini terdapat dalam keterangan (jika si mati telah menggunakan alat sedut ventolin dan jika ia terbukti tidak berkesan, kemungkinan bahawa tapak reseptornya telah disekat oleh kesan blocadren) ia akan membawa hakim bicara kepada kesimpulan bahawa blocadren adalah punca 'kerosakan' yang berlaku yang dialami oleh si mati. Beban terletak atas perayu untuk membuktikan hubungkait, atas imbangan kebarangkalian, antara kecederaan si mati dan kecuaian responden, oleh itu persoalan yang timbul adalah sama ada rantaian penyebaban telah dibuktikan pada tahap yang diperlukan bagi pembuktian.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:

(1) Atas kekukuhan keterangan yang telah dikemukakan oleh PW1, didapati bahawa si mati telah cuba mengurangkan serangan asma dengan menggunakan alat sedut ventolin, yang dalam kes in telah gagal untuk melegakan kecemasan yang dialaminya. Rujukan boleh diambil bahawa tapak reseptornya telah disekat oleh kesan blocadren, kerana 'ubat penyelamat' tidak berkesan. Tiada keterangan menunjukkan dos ativan, ubat relaksan otot yang telah dipreskripsikan oleh PW3 sehari sebelum kejadian tersebut berlaku adalah cukup tinggi untuk mengurangkan pernafasan sehingga tahap jantung si mati berhenti dan menyebabkan kekurangan oksigen dalam otaknya. Keterangan yang telah diberikan oleh PW1 tidak dibantah. Oleh itu, atas imbangan kebarangkalian, ia adalah blocadren yang telah menyebabkan kerosakan yang berlaku pada si mati, di mana penyebaban telah dibuktikan.

(2) Keterangan yang memadai telah menunjukkan bahawa kedua-dua ativan dan ventolin bukanlah petanda kepada reaksi kronik yang telah dialami oleh si mati. Adalah jelas atas beberapa kebarangkalian bahawa tablet blocadren yang telah menyebabkan

tindak balas teruk yang dialami si mati. Si mati telah meninggal dunia akibat kekurangan pernafasan akut, kecederaan otak hipoksia dan pernafasan terhenti disebabkan serangan asma bronkus. Walaupun dihujahkan bahawa si mati telah menelan dua tablet ativan sehari sebelum kejadian tersebut, ia tidak mempunyai kesan ke atas pernafasannya dan tidak boleh dikaitkan dengan kecederaannya selepas itu. Tetapi reaksinya kepada blocadren adalah serta merta dan teruk. Si mati tidak akan mengalami sekatan yang begitu teruk sekali mengakibatkan penutupan bronkiol si mati 'but for' kesan blocadren.

(3) Jurnal perubatan yang dirujuk oleh peguam menyokong pendapat bahawa penghalang beta tak spesifik tidak sepatutnya diberikan kepada seorang yang mempunyai penyakit asma, melainkan jika ia adalah kardio terpilih dan asma itu adalah dikawal dan dipantau dan/atau di mana manfaat melebihi risiko. Tambahan lagi, ulasan yang diberikan oleh hakim bicara bahawa 'jika terdapat keterangan yang si mati telah mencuba menggunakan ventolin selepas menelan tablet blocadren dan ia gagal memberi kesan yang diingini, maka mungkin ia adalah selamat untuk menyatakan bahawa blocadren telah menghalang ubat si mati untuk asma' menjadi amat penting memandangkan bahawa hakim bicara telah dilucutkan daripada mempertimbangkan keterangan ini dalam nota keterangan PW1 yang telah hilang. Jika hakim bicara telah dapat menilai keterangan-keterangan ini, beliau akan membuat kesimpulan yang berbeza berkenaan isu penyebaban.

(4) Setiap penghubung dalam rantaian penyebab telah dibuktikan dengan tahap bukti yang lebih tinggi daripada tahap yang diperlukan. Terdapat alasan yang mencukupi untuk hakim bicara, atas imbangan kebarangkalian, mendapati bahawa penghalang beta blocadren adalah sebab langsung status asma yang melanda si mati selepas dia menelan ubat tersebut atas alasan (i) ubat yang diambil oleh si mati tidak akan merangsang tindak balas teruk yang dialami si mati sepertimana penghalang beta yang diambilnya dan yang telah diberi preskripsi oleh responden; (ii) terdapat material yang memadai dan keterangan daripada pakar yang dikemukakan untuk mengesahkan bahawa penghalang beta tak spesifik adalah berbahaya kepada pesakit asma; dan (iii) keterangan responden sendiri menunjukkan bahawa dia sedar penghalang beta (blocadren) tidak sepatutnya dipreskripsikan dalam keadaan sedemikian. Mahkamah ini

berpuas hati bahawa terdapat kewajipan berhati-hati dari pihak responden, bahawa kewajipan telah dilanggar dan kerosakan yang terhasil adalah boleh dijangkakan. Penyebaban oleh itu telah dibuktikan oleh perayu.

Case(s) referred to:
Bolitho v. City and Hackney Health Authority [1997] 4 All ER 771 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Mohd Nazari Ab Majit v. Tan Keo Hock & Anor [1999] 1 CLJ 601 HC ***(refd)***

For the appellant - Americk Sidhu; M/s Isharidah, Ho Chong & Menon
For the respondent - MS Dhillon (KB Karthi with him); M/s PS Ranjan & Co

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S6-22-1036-2002]

Reported by Suhainah Wahiduddin

JUDGMENT

Zainun Ali JCA:

[1] This appeal is filed by the appellant against that part of the decision of the learned High Court Judge made on 25 May 2009, which relates to the issue of causation. There has been no cross appeal brought by the respondent against any of the other findings made by the learned judge. Thus this appeal is exclusively confined to the issue of causation.

Background

[2] The appellant is the administrator of the estate of his deceased daughter, Melissa Jane Goh Mei Feng. Prior to her death she was employed as a guest relations officer with the Mandarin Oriental Hotel in Kuala Lumpur and was an air stewardess with Malaysia Airlines just prior to joining the hotel.

[3] The respondent one Dr Lee King Ong, was at all material times a doctor in private general practice in Kuala Lumpur.

[4] On the evening of 28 July 1999, the deceased was seen by the respondent at his clinic, accompanied by her mother. The deceased complained of rapid heartbeat and hand tremors.

A **[5]** The respondent prescribed a drug known as "blocadren" which was in tablet form. There were four (4) tablets of blocadren whereby the deceased was instructed to take only a quarter of a tablet once or twice daily. According to the respondent the blocadren was to help slow down the deceased's pulse rate.

B

[6] It is the appellant's case that upon arriving home that same evening, in the company of friends, the deceased swallowed the recommended dosage of a quarter of the said drug but almost immediately thereafter suffered breathing difficulties.

C

[7] What transpired shortly after this is critical in terms of evidential value. This is seen in the conflicting accounts given by both parties. This problem is exacerbated by there being chunks of the notes of proceedings being omitted from the court records.

D **[8]** It is the appellant's case that, shortly after swallowing the quarter part of blocadren, the deceased experienced breathing difficulties and in the car on the way to the Pantai Medical Centre, she collapsed.

E **[9]** Upon arrival at Pantai Medical Centre, one Dr Damodoran (PW5) a consultant anaesthetist, resuscitated the deceased. Unfortunately she suffered severe brain damage and remained in a coma from which she did not recover until her death in Galway, Ireland on 15 March 2000.

F

[10] The appellant as administrator of the deceased's estate sued the respondent for negligence and damages pursuant thereto, in prescribing blocadren, a non-selective beta-blocker to the deceased who was asthmatic, when this drug is contraindicated to her condition.

G

[11] From the record it is seen that the learned trial judge directed the matter to first proceed on the issue of liability, and indicated that depending on the court's findings, would go on for assessment of damages if necessary.

H

[12] The sequence of proceedings in the High Court is illustrated below.

I

In The High Court

[13] The matter was heard in the High Court over a period of time during which after hearing the evidence of witnesses for both parties, the learned trial judge on 6 December 2006, pronounced *inter alia*, the following:

> … Let me put it this way. Having reviewed the evidence of her coma to the conclusion that it would not be unreasonable to proceed with the issue of quantum of damages. In other words, it **is an indication that my decision is that the defendant is liable** and I will proceed to hear on the issue of quantum... And at the end of that exercise then I would deliver one complete decision... I am not issuing the decision. Alright. So the intention here is this. *I will combine both liability and quantum into the decision at the end of the day and then you can file an appeal straightaway on that.* Otherwise it becomes very untidy… (emphasis added)

[14] The matter then proceeded in respect of the assessment of damages, where witnesses for both parties testified. Submissions were still filed by the respondent as regards issues of liability, stressing on the questions of causation and foreseeability.

[15] The learned trial judge finally delivered his decision on 25 February 2009, where he dismissed the appellant's claim with costs.

[16] A careful reading of the grounds of judgment of the learned trial judge would show that he decided that there was a duty of care owed by the respondent to the deceased; that there was a breach of this duty of care and that the resultant damage was foreseeable. However the learned trial judge decided that the issue of causation had not been established and His Lordship therefore dismissed the appellant's claim.

[17] The issue before us is this: was there a failure by the appellant to establish causation?

[18] It is the appellant's case that causation had indeed been proven but that the learned trial judge had not had the benefit of referring to certain excerpts of the evidence adduced, since these particular excerpts were inadvertently omitted from the body of evidence before the court.

[19] The "missing evidence" was that of PW1's (the mother of the deceased) testimony. The said missing evidence was only discovered during the course of filing the record of appeal. This fact was confirmed by the trial judge's secretary. The missing portion of the evidence has since been supplied to parties with the assistance of counsel for the respondent.

[20] Since the issue at hand is whether upon consumption of the blocadren prescribed to her by the respondent, the deceased had tried to use ventolin inhaler (since she had asthma) after she experienced breathing difficulties, the evidence of PW1 with regard to this portion of evidence is therefore crucial.

[21] If evidence had been shown that the deceased had indeed tried to use her ventolin inhaler and that it had been ineffective, then several assumptions could be drawn. One of the said assumptions is that her receptor sites had been blocked by the effect of blocadren, since even with the use of ventolin (which is a rescue medication), this relief had no effect on the deceased's condition.

[22] This assumption is very likely to be made, in the light of the implication found in the judgment of the learned trial judge. The learned trial judge had implied that should this be in evidence (that if the deceased had used her ventolin inhaler and if it had proven to be ineffective, chances are that her receptor sites had been blocked by the effects of blocadren) it would have led him to conclude that the blocadren was the cause of the resultant "damage" suffered by the deceased.

[23] The relevant passage of the learned judge's judgment reads thus:

> … Further, other than PW1's testimony that the deceased always carried Ventolin, there is no evidence that she had in fact tried to use it after taking the Blocadren that evening in order that one could safely say that upon a balance of probabilities it was the Blocadren that blocked the deceased's medication for asthma, because the respiratory difficulties being the result of Ativan being taken cannot be ruled out.
>
> In the event, I cannot conclude that upon a balance of probabilities it was Blocadren that prevented medication having effect for the attack suffered by the deceased.

[24] In other words, the judgment went so far as to suggest that had there been some evidence that the deceased had used her ventolin inhaler and that it had proved to be ineffective, then on a balance of probabilities, it must have been the blocadren which caused the deceased her resultant damage – which means causation would have been proven, for otherwise, that damage could also have been occasioned by the use of the drug "ativan" as well.

[25] Whether the learned trial judge is correct or otherwise in his reasoning (especially with regard to the physiological and pharmacological dynamics of the two drugs (blocadren and ativan) is another matter. This will be dealt with latterly.

[26] For the moment, let us consider the transcript of the "missing" notes of evidence of PW1 which were apparently not appraised by the learned trial judge.

[27] In answer to questions asked of PW1 in examination-in-chief, her answers are reproduced below:

> PW1 (deceased's mother)
>
> She took it … must have been … we were in the apartment probably about 20 minutes to half an hour when we were sitting in the kitchen and having a drink. She was drinking some ... She picked it off the floor and she swallowed it and she laughed.
>
> Some of her friends arrived and we were all sitting around the table and chatting. One of her friends who had just come back from Ireland, he just... But I noticed Melissa get up and leave the table after a while... And she said, "Mum, that tablet brought on my asthma.
>
> And I said, take your ventolin and she says, "I have, but not working". And I thought she may have … thing that was not working.
>
> And she said "It's not that, the ventolin is not working". So I realized straight away that it has to be something to do with the tablet she had taken.
>
> I asked her whether has that ever happened before and she said, "No never". And I realized she was in trouble. So I tried calling Dr. Lee to ask him whether it was the medicine. And we couldn't get him at his clinic, it must have been closed as no one picked up the phone.

> I thought I got to get her to the hospital … and ... she couldn't breathe. She was getting worse by the minute and I ... And her friend, we all got in the lift and went down from the 11th floor and I ran down to get the car ... By the time I got her into the car, she was on her knees. She could hardly even walk.
>
> She was breathless, she was panicked, she was frightened and I drove her to the hospital …
>
> She sat in the front seat. She was struggling, trying to get breath, she was tearing her clothes, she was putting her hand out the window, she was even pulling at me, "Mummy help me, I can't breathe".

[28] What appears critical is this. The entire excerpt above was not in the court transcript. The learned trial judge appears to be oblivious to this piece of evidence, as can be seen at para. 45 of his judgment.

[29] What appears critical too is this. That none of the above evidence given by PW1 was challenged.

[30] Thus on the strength of the evidence adduced, it is the appellant's case that the deceased had in fact attempted to mitigate the sudden onset of what she believed to be an asthma attack, by using her ventolin inhaler, which in this case failed to ease her distress.

[31] In view of the above, the question is whether the chain of causation had been established to the required degree of proof.

[32] The burden of course rests on the appellant to prove causal connection on a balance of probabilities, between the deceased's injury and the respondent's alleged negligence.

[33] It is the appellant's case that the respondent ought not to have prescribed blocadren to the deceased as she was an asthma patient; that the respondent should have determined beforehand that the deceased was a known asthma sufferer and that she should have been warned that blocadren was incompatible to a person in her condition; and that she be warned of its harmful side effects.

[34] The respondent disputes the appellant's allegations that the deceased was asthmatic or known to be one. In fact the respondent contends that the deceased had suppressed the fact that she has an asthmatic condition; and that even if she was

asthmatic, it was well controlled and so would not suffer an adverse reaction to blocadren. The respondent disputed that blocadren had caused the violent reaction suffered by the deceased and that this event was not foreseeable. A

[35] Consequently the rival contentions of the respondent and the appellant are to be viewed in the context of the element of causation which is a question of fact. (*Bolitho v. City and Hackney Health Authority* [1997] 4 All ER 771). B

[36] The respondent went on to state that when the deceased was rushed to Pantai Medical Centre on that fateful evening, the treating doctor was one Dr Damodaran (PW5). C

[37] PW5 said that the deceased's condition on admission to Pantai "could have been caused" by blocadren. The respondent's case is that PW5's vague stance regarding the issue of whether blocadren had caused the deceased's condition, is highly speculative and thus provides insufficient evidence to establish causation. D

[38] It was in evidence that a day earlier (before the deceased was rushed to Pantai) ie, on 27 July 1999, the deceased had gone to see one Dr Jagjit Singh (PW3) of Klinik Segara. He had noted "palpitations" but did not record any respiratory condition on that occasion. PW3 prescribed ten tablets of ativan, where one tablet was to be taken each day. In court, eight tablets of ativan were rendered. E F

[39] It is the respondent's case that a member of the respondent's staff gave evidence that he had questioned the deceased regarding the deceased's history of allergy or serious illness and that neither the deceased nor her mother, PW1, gave any information thereof. Thus in the absence of such evidence, the respondent contended that he then prescribed the said drug blocadren to the deceased. G

[40] In view of the issues before this court, a close scrutiny of the evidence of PW1 (mother of Melissa, the deceased) is evidently material. H

[41] PW1, Ms Anne Kerr Lim testified that she met Melissa on 26 July 1999 when she returned to Malaysia from Ireland after a year's absence. She was away in Ireland to look after her younger children who were studying there. I

[42] PW1 testified that her daughter Melissa (the deceased) had been asthmatic since she was five or six years old. She said that one Dr Tan of Kuching had diagnosed the deceased as having had asthma when she was little.

[43] PW1 said that when she met her daughter, the deceased, she was shocked to see that the deceased had lost a lot of weight, had palpitations and seemed anxious and had tremors in her hands.

[44] PW1 said that generally the deceased did not look well at all.

[45] Thus after a day of her arrival from Ireland, PW1 took the deceased to see one Dr Lee (the respondent), since in her view the deceased had displayed the same symptoms she herself had, when she had thyroid problems in the past.

[46] According to PW1, the respondent had in the past given her (PW1) a beta-blocker to help her with her thyroid condition. PW1 testified that the deceased had the same symptoms she had (ie, weight loss, anxiety, palpitations and hand tremors). That was why she said, she took the deceased to see the respondent for treatment. PW1 and the deceased arrived at the respondent's clinic at 5.30 or 6pm on 28 July 1999.

[47] The deceased was asked to fill up a form regarding details of her name, age, residence etc.

[48] According to PW1, when told of the deceased's condition, the respondent then took her pulse and blood pressure.

[49] The respondent said that the deceased's pulse rate was fast and that her blood pressure was on the 'low' side.

[50] According to PW1, the respondent did not listen to the deceased's chest using the stethoscope.

[51] It is PW1's testimony that the deceased voluntarily told the respondent that she had gone to see the company doctor over her condition.

[52] According to PW1, the respondent did not ask the deceased whether she was on any medication; that it was the deceased who voluntarily told the respondent that she had been prescribed tranquillisers by the panel doctors of Mandarin Oriental Hotel

where she worked and that the said panel doctors had taken her blood sample. She told the respondent that she would send him the blood sample later.

[53] Of critical importance is the fact of PW1's evidence that at no time did the respondent ask the deceased whether she was asthmatic.

[54] This piece of evidence is critical in the light of the medication which the respondent later prescribed for the deceased.

[55] Subsequently, the respondent asked Melissa to give him a sample of her urine, to rule out the possibility of diabetes. After testing the urine sample, the respondent pronounced that it is 'clear'.

[56] The respondent then prescribed blocadren for the deceased.

[57] Whilst waiting for the nurse to prepare the medication, PW1 testified that she told the deceased to stop taking the medication prescribed by the panel doctors because it is not advisable to take it together with the medication prescribed by the respondent since she could begin taking the respondent's medication right away.

[58] The issue now is whether the respondent was negligent in prescribing blocadren to the deceased as she was asthmatic.

[59] It is undisputed that blocadren was a beta-blocker and there was contra indication to beta-blocker being prescribed to patients with asthma.

[60] The appellant alleged that the respondent failed to ask the deceased or her mother (PW1) who was present with her at his clinic, as to whether the deceased had asthma or was under treatment for asthma. The facts also showed that the deceased was prescribed 'ventolin', 'bricanyl' and 'ativan' by another doctor the day before she collapsed after ingesting "blocadren".

In The High Court

[61] The court accepted that blocadren was prescribed to asthmatic patients where there was relatively minor risk and where the asthma was well-controlled. It was also the court's finding

A that blocadren would be prescribed with caution where there was material risk and the circumstances where such that it was necessary to so prescribe.

[62] It was also the learned trial judge's finding that the deceased B had a history of not disclosing her asthmatic condition and that the respondent had relied upon the answer given by the deceased to the question that she has no allergies.

[63] The trial judge went on to conclude that if the respondent C had asked the deceased whether she had asthma, she could have lied, but she could, in equal measure, have told him the truth.

[64] The trial judge's finding is that a patient has a duty to be candid and truthful to her doctor, in the absence of which, the doctor would have a complete defence. It is the trial judge's D finding that in the present appeal, had the deceased disclosed her asthmatic condition, the respondent could have gone on to determine whether there was a material risk or not in prescribing Blocadren to her.

E **[65]** The learned trial judge's finding is also that since the respondent did not ask the deceased if she had asthma, the issue of whether the respondent as a doctor, was misled by an untruthful answer, given the suppression of information by his patient, did not arise. This is because without any knowledge of F whether the deceased had asthma or not, and how often or how serious the attacks were, the respondent could not have considered the risks concerned.

[66] The learned trial judge found that there was no evidence G that blocadren caused or triggered respiratory or asthma attacks; that there was also no evidence that the deceased had an allergic reaction to blocadren; that it could not safely be said that the blocadren triggered the attack that led to her collapse, coma and eventual death; however on the evidence it was probable that the H deceased had an asthma attack.

[67] The learned trial judge also found that 'ventolin' was a beta agonist, the effect of which could be blocked by a beta-blocker. It also had its own side effects, many of which were manifested by the deceased, as told to the court by her mother, PW1. It also I raised the unanswered question of whether it was something other than blocadren that was the culprit, causing the attack on the deceased.

[68] The learned trial judge went on to say that as for 'ativan', it was a prescription for nervousness or anxiety which was in fact, the very symptoms the deceased displayed on the material day, as observed by her mother. Ativan could repress or depress respiration, as testified by the doctor who had prescribed it to the deceased the day before. While ten tablets were prescribed, only eight were accounted for. Though the deceased's mother had advised her not to take the ativan, it could not be ruled out that she had taken one in the circumstances. Thus there was no evidence to connect any particular medication leading to the deceased's condition of severe breathing difficulty. The learned trial judge also found that there were no medical records before the deceased's death to show that it was blocadren or other medication that had caused her death.

[69] More critically, the learned trial judge found that there was also no evidence that the deceased tried using ventolin for her asthma after taking blocadren, to conclude on a balance of probabilities, that it was blocadren which blocked the deceased's medication for asthma. And for good measure, the learned trial judge also found that the respiratory difficulties being the result of the ingestion of ativan could not also be ruled out.

[70] The learned trial judge dismissed the appellant's claim on the basis that the cause of the deceased's condition and eventual death had not been proven to be the act of the respondent's negligence and that causation too had not been proven by the appellant. Thus in brief, the learned trial judge reiterated that the appellant would only succeed in an act for negligence if proof of the following essentials in respect of liability was achieved:

(i) That there was a duty of care owed by the respondent to the deceased patient;

(ii) That there was a breach of this duty of care;

(iii) That the negligent act of the respondent caused the pleaded damage;

(iv) That the pleaded damage was reasonably foreseeable.

[71] As could be discerned, the learned trial judge found for the appellant in three of the above requisites but decided that the issue of causation had not been established.

[72] It bears repeating that it is the appellant's case that causation had indeed been proven, but that due to some inexplicable inadvertence, the learned trial judge had not had sight of certain evidence, which if that evidence had been available to him, would have resulted in there being a contrary finding. In fact this is the crux of this appeal.

[73] The evidence which was not before the learned trial judge was that given by PW1 (the deceased's mother) as alluded to earlier.

[74] In fact, after the learned trial judge delivered his decision and during the course of filing the appeal record, it was discovered that a section of the notes of evidence provided by the High Court were missing and this state of affairs was confirmed by the judge's secretary.

[75] Subsequently the "missing record" was reconstructed from the personal written notes of the respondent counsel and the professionally transcribed audio recording of the evidence adduced by PW1. These notes and transcribed recording appear on rekod rayuan tambahan. (pp. 3-117).

[76] It is the appellant's case that the 'missing' recorded evidence of PW1 had resulted in the learned trial judge being severely handicapped in arriving at an appropriate conclusion as regards the question of causation.

[77] As is evident, the issue is whether the deceased had in fact tried to use her ventolin inhaler after she experienced breathing difficulties upon consumption of the blocadren tablet prescribed to her by the respondent.

[78] Should there be any evidence that the deceased had, as a matter of fact, used the said inhaler, and that it had proven to be ineffective, then a reference could have been drawn that her receptor sites had been blocked by the effects of blocadren, since it is obvious that the 'rescue medication' (ventolin) was ineffectual.

[79] In fact, the learned trial judge implied as much in his judgment. This was what the learned trial judge said at paras. 45 and 46 of his judgment:

> 45. Further, other than PW1's testimony that the deceased always carried Ventolin, *there is no evidence that she had in fact tried to use it after taking the Blocadren that evening in order that one could safely*

> *say that upon a balance of probabilities it was the Blocadren that blocked the deceased's medication for asthma*, because the respiratory difficulties being the result of Ativan being taken cannot be ruled out.
>
> 46. In the event, I cannot conclude that upon a balance of probabilities it was Blocadren that prevented medication having effect for the attack suffered by the deceased. (emphasis added)

[80] What can be implied on a scrutiny of the above passage of the judgment is this:

> That had there been some evidence that the deceased had used her Ventolin inhaler and it had not produced the desired effect, then on a balance of probabilities, it must have been the Blocadren which caused the deceased her resultant damage, in which case, causation would have been proven, for otherwise this damage could also have been caused by the deceased's use of the drug 'Ativan' as well.

[81] The appellant's case is that the ingestion of the drug 'ativan' could not have resulted in the reaction which the deceased manifested contrary to the submission argument put forward by learned counsel for the respondent in the court below.

[82] This is simply because this drug 'ativan' is actually a muscle relaxant and although it may cause depression of respiration if the dosage is high, it will never cause a constriction of the airways the way blocadren would. In other words, it is the appellant's case that the physiological and pharmacological mechanics of these two drugs (ativan and blocadren) are completely at variance with each other.

[83] In view of the facts above, what stood out in stark contrast is the finding of the learned trial judge who said that there is no evidence that the deceased displayed any allergic reaction to blocadren.

[84] However, before going into the realm of causation there is need to see whether any other drug used by the deceased (ie, ativan, ventolin and bricanyl) would negative the perception that blocadren caused the deceased's injury.

A

Ativan

[85] From the medical records and evidence adduced by PW2 one Dr Ranbir Kaulsay under cross-examination, it can be seen that ativan is a relaxant. It is prescribed to reduce anxiety. It is
B not contraindicated in asthmatic patients.

[86] However the respondent had introduced the ativan issue by suggesting that it was the ingestion of the ativan tablet by the deceased that had brought on her severe asthma attack. It was the respondent's allegation that the deceased had consumed two
C of the ten tablets after having been prescribed them by Dr Jagjit Singh (PW3) the day before.

[87] However there is no evidence before the court to prove that the deceased had in fact taken any of the ativan tablets.

D

[88] Even if there was ingestion of two ativan tablets by the deceased on the day before the incident, there appears to be no immediate reaction which was severe and irreversible as happened when she ingested the blocadren tablet.

E

[89] Although DW5, one Dr Rajakumar (a specialist) had said in examination-in-chief that an asthmatic patient given ativan would experience reduction of anxiety but could also have depressed respiration, this state of affairs is a far cry from having one's
F respiration being completely shut off.

[90] Ativan is a relaxant/sedative and it is expected to reduce respiration to a certain extent, depending on the degree of dosage.

[91] There is no evidence that the dosage of ativan prescribed by
G PW3 the day before this incident was high enough to reduce respiration to such an extent that the deceased's heart actually stopped and her brain deprived of oxygen, leaving her in a coma. No evidence has been led to show ativan could have had this effect.

H

[92] In fact, under the circumstances, all the evidence have shown that only a non-selective beta-blocker (blocadren) could have caused this reaction in an asthma patient.

I

The Blocadren

[93] It would be pertinent to now examine the effects of this beta-blocker.

[94] From the evidence of PW2 Dr Ranbir Kaulsay, it would appear that the said beta-blocker can be given to an asthmatic patient if the said patient is a well-controlled asthmatic; that for an uncontrolled asthmatic, the beta-blocker makes the condition worse.

[95] This analysis of the said non-selective beta-blocker is reinforced by the evidence of DW6, Dr Kuppusamy who said in examination-in-chief, that he would not normally use it for a case of asthma and that if given, the said patient is expected to experience bronchospasm which can be mild to moderate, or it could be severe or very severe.

[96] DW6's analysis of how an asthmatic would be affected by the effects of a non-selective beta-blocker is well documented in his evidence at pp. 144-150 of the appellant's core bundle. It is significantly documented that the said blocadren is a "beta antagonist", a chemical that blocks receptor sites in nerve synapses; thus if a person is asthmatic and has constricted airways, the latter would be further constricted by a beta-blocker.

[97] Although a proper assessment of DW6's evidence would suggest that the position is not entirely irreversible, it would be so if the beta receptor is blocked permanently. Then the agonist will not be able to stimulate it; a lot depends on the percentage of beta receptors being blocked.

[98] After having assessed DW6's evidence it is clear that his analysis is consistent with the fact that if the asthmatic's condition is well controlled it would be fine – otherwise the use of a non-selective beta-blocker such as was done in the present appeal, should be administered with caution. As significantly observed by DW6:

> … If I knew the patient was asthmatic, I would be very cautious.

[99] DW6 conceded, under cross-examination that doctors would err on the side of caution in treating a patient; that a layman would not know how a beta-blocker works.

[100] It might be said that DW6 gave a balanced analysis on the administration of blocadren. It is his evidence that it was just possible given the facts in this case and after reading the medical reports, the condition the deceased found herself in was triggered by the ingestion of blocadren.

[101] Given the lucid medical evidence of both DW5 and DW6 and after having all the evidence adduced, the learned trial judge who delivered his decision on the issue of causation correctly concluded that:

> … the collapse and coma of the deceased resulted from inability to breathe, consistent with a severe respiratory attack … (Core Bundle p. 15)

[102] However the learned trial judge went on to say that:

> … there is no evidence before the Court that the deceased had an allergic reaction to Blocadren. It cannot be said therefore that the Blocadren prescribed in this case triggered the attack that led to her collapse, coma and eventual death. If there is almost no known risk the Blocadren could cause a severe allergic reaction, there is no duty to warn the deceased. This question is also irrelevant because there is no evidence it was in fact the Blocadren that caused the deceased's condition …

[103] But as we now know, this portion of the judgment was made "*per incuriam*" the evidence which was inadvertently omitted for consideration.

[104] From the court records, it is clear that the learned trial judge appears to have accepted the fact that ventolin is a beta agonist which relaxes the muscle in the airways. His Lordship observed that:

> … the logic appears to be that these beta agonist (Ventolin and Bricanyl) relaxes the muscle of the airways to make breathing easier and therefore efficacious in asthma as well as respiratory tract problems affecting breathing.

[105] This observation appears to reinforce the notion that ventolin was not the cause of the deceased's injury.

[106] Then what was?

Having negatived the use of ativan and ventolin as the possible precursors to the reaction experienced by the deceased, we are left with two possible reasons.

[107] We agree with the suggestion put forward by the appellant counsel that this reaction was either spontaneous or was precipitated by the consumption of blocadren.

[108] Given that spontaneity was not pleaded or canvassed as a reason for the deceased's reaction, the only remaining conclusion could be the deceased's ingestion of blocadren.

[109] Was blocadren the *causa causans* of the deceased's severe asthmatic attack?

The consultant anaesthetist Dr Damo (PW5) who resuscitated the deceased, stated in his evidence that:

(i) The deceased had suffered an acute bronchial spasm leading to an asthmatic attack and this could have caused her condition;

(ii) That the deceased was in "status asthmatics" and he had been informed later by the deceased's mother that the deceased had been given a beta-blocker;

(iii) That assuming the deceased was an asthmatic and she ingested blocadren, it would have been possible that her condition was caused by that tablet;

(iv) That in daily practice, he would try to avoid prescribing a beta-blocker to known asthmatics as it can induce asthmatic attacks.

[110] Although PW5 (Dr Damo) did not categorically testify that blocadren caused the deceased's condition he could not be faulted, for he was not privy to the events prior to his attempt to resuscitate the deceased.

[111] Looking at the evidence adduced, both oral and documentary, in our view there is overwhelming evidence firstly that both ativan and ventolin are not the precursors to the violent reaction experienced by the deceased. And that in consideration of all the evidence adduced, it is clear on a preponderance of probabilities that it was the blocadren tablet which brought on the severe reaction experienced by the deceased.

[112] Or putting it in another way, the deceased would not have experienced a severe restriction resulting in the closing up of her bronchioles, "but for" the effects of the blocadren.

[113] This fact is reinforced by the contents in paras. 2 and 9 of the statement of agreed facts, where *inter alia*, para. 9 of the statement of agreed facts states as follows:

> That the drug Blocadren is in actual fact a 'beta blocker' and is contraindicated as a prescription in patients with a history of bronchospasm, including bronchial asthma.

[114] Other undisputed facts included those of the evidence of one Dr Samuel Easaw DW7, who confirmed in examination-in-chief that he had been referred to two documents which had been admitted ie, the medical reports of one Dr Tai (Pantai Hospital) and one Dr Greenwood (Wellington Hospital London). This court is able to consider these evidence based on the dictation of cases such as *Mohd Nazari Ab Majit v. Tan Keo Hock & Anor* [1999] 1 CLJ 601 and *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where if the documents had been admitted but their makers were not called, to give evidence, these documents had been read or referred to by either party in the trial "wholly or partly … either in examination of any witness, in submission at any stage or even on any unilateral drawing the court's attention to it by either of the parties not any time before the conclusion of the case".

[115] Bearing this in mind and the fact that it is up to the court to so determine at the end of the whole case 'regard being had to any absence of challenge by either of the parties on any part of the document, we felt compelled to scrutinise these documentary evidence. Dr Tai in his medical report dated 7 August 1999 stated that the deceased was in 'status asthmatics'; had acute exacerbation of bronchial asthma … had collapse and ventilated in ICU …'.

[116] Dr Greenwood in his report of 7 October 1999 stated that:

> … Ms Goh was admitted to the Wellington Hospital Rehabilitation Unit on 6.10.1999 in the untext of a severe hypoxic ischaemic brain injury she sustained on 28.7.1999 in Malaysia when she had a cardiac urhest in status asthmatics, **triggered by the prescription of a beta-blocker**. (emphasis added)

[117] Dr Tai produced another medical report dated 11 August 1999 in which he stated categorically that:

> Melissa is a known case of bronchial asthma, a Ventolin inhaler. On the night of 28.7.1999 she was taken to a GP by her mother, as she was unwell and had complained of palpitations on and off.

> ….. she was prescribed a 1/4 tablet of Blocadren for symptomatic relief. **Almost immediately** she developed severe bronchospasm and was rushed to the A & E Department, Pantai Medical Centre, Kuala Lumpur. (emphasis added)

[118] It is also an agreed fact that the deceased died from acute respiratory depression, hypoxic brain injury and respiratory arrest following a bronchial asthmatic attack.

[119] Even if it is argued that the deceased had ingested two ativan tablets the day before, they had no effect on her breathing and so could not be attributed to her injury thereafter.

[120] But her reaction to the blocadren was immediate and severe.

[121] The medical journals referred to by counsel support the view that a non-specific beta-blocker should never be given to an asthmatic, unless it is cardio-selective and that the asthma is well controlled and monitored and/or where the benefits outweigh the risks.

[122] And in addition, the comment made by the learned trial judge that "if there had been evidence that the deceased had tried to use Ventolin after taking the Blocadren tablet and that it had not worked, then perhaps one-could safely say it was the Blocadren that blocked the deceased's medication for asthma," becomes extremely significant in the light of the fact that the learned trial judge had been deprived of considering this very evidence in the missing notes of PW1's evidence.

[123] It is abundantly clear that it the learned trial judge had been appraised of this evidence, he would have found differently on the issue of causation.

[124] This becomes all the more crucial when one considers the fact that none of the above evidence given by PW1 was challenged.

[125] It is our view that every possible link in the chain of causation has been established to the degree of proof which is much higher than the requisite level.

[126] Thus on a scrutiny of the entire evidence adduced in this case, there were more than sufficient grounds for the learned trial judge on a balance of probabilities to have found that the beta-

A blocker blocadren was the direct cause of the status asthmatics in which the deceased found herself immediately after ingesting the same for the following reasons:

(i) No drug taken by the deceased would have elicited the violent
B response she experienced as the beta-blocker she ingested and which was prescribed by the respondent;

(ii) There were sufficient medical and expert evidence adduced to confirm that a non specific beta-blocker was dangerous in
C asthmatics;

(iii) The respondent's own evidence suggests that he himself was aware that a beta-blocker (blocadren) ought not to have been prescribed in the circumstances.

D **Decision**

[127] Thus it is our unanimous decision that based on the evidence before us, we are satisfied that:

(i) There was a duty of care on the respondent's part;
E

(ii) that duty was breached; and

(iii) and that the resultant damage was foreseeable.

[128] We are thus satisfied that on a balance of probabilities,
F causation was proved by the appellant.

[129] We therefore allow this appeal with costs. Costs of RM15,000 to the appellant. Deposit refunded to appellant.

G **[130]** However we order that the case be sent back to the High Court for damages to be assessed by the Registrar, and that costs in the High Court be taxed.

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